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No. 97-1396

In the Supreme Court of the United States

OCTOBER TERM, 1997

VICKY M. LOPEZ, ET AL., APPELLANTS

v.

MONTEREY COUNTY, CALIFORNIA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

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QUESTION PRESENTED

Whether a county covered by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, may administer voting changes put in place by county ordinances without obtaining either administrative or judicial preclearance of those changes, on the ground that the State, which is not covered by Section 5, later enacted those changes into state law.

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INTEREST OF THE UNITED STATES

This case involves the construction of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. Whenever a jurisdiction covered by Section 5 "shall enact or seek to administer" any change in voting practices or procedures, it must obtain either administrative preclearance of the change from the Attorney General or judicial preclearance from the United States District Court for the District of Columbia. The Attorney General is also authorized to bring suit to enjoin the implementation of unprecleared voting changes. The decision in this case may substantially affect the Attorney General's administrative and enforcement responsibilities under Section 5. The United States has participated as *amicus curiae* in this case in

the district court and on the prior appeal in this Court, see *Lopez* v. *Monterey County*, 117 S. Ct. 340 (1996).

STATEMENT

1. This Court's prior opinion in this case, *Lopez* v. *Monterey County*, 117 S. Ct. 340 (1996), sets forth much of the case's procedural history. Monterey County, California, is one of four counties in California covered by Section 5 of the Voting Rights Act of 1965 (Act), 42 U.S.C. 1973c. See 28 C.F.R. Pt. 51 App. Monterey County was designated as a covered jurisdiction in 1971 pursuant to the criteria set forth in Section 4(b) of the Act, 42 U.S.C. 1973b(b). The Attorney General identified California as a State that had in effect a literacy test for voting on November 1, 1968, see 35 Fed. Reg. 12,354 (1970), and the Director of the Census determined that less than 50% of the voting age population in Monterey County had voted in the 1968 presidential election, see 36 Fed. Reg. 5809 (1971). As a consequence of those determinations, Section 5 requires Monterey County to obtain either administrative or judicial preclearance of any voting practice in the County different from the practices in effect on November 1, 1968. See *Lopez*, 117 S. Ct. at 343.

Because the Director of the Census did not find that the rates of voter registration or participation in California as a whole fell below 50% of the statewide voting age population at the relevant times listed in the statute, the State of California itself is not covered under Section 5 as a State. Thus, the only parts of California subject to the preclearance requirements of Section 5 are the four counties where rates of voter registration or participation were less than 50% of the voting age population. See 42 U.S.C. 1973(b); 28 C.F.R. Pt. 51 App. Monterey County would not have been covered absent the State's maintenance of an English literacy voting test, which was in place until the

California Supreme Court struck it down as unconstitutional in 1970, see *Castro* v. *State*, 466 P.2d 244.

California is one of seven "partially covered" States, *i.e.*, States in which only some political subdivisions are covered by Section 5. The other six such States are Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota. 28 C.F.R. Pt. 51 App.[1] Those seven States are not considered covered jurisdictions themselves. Therefore, although changes that are enacted or administered in the covered political subdivisions in those States must be precleared, the States themselves are not required to make preclearance submissions on behalf of either themselves or their covered political subdivisions. The Attorney General's guidelines implementing the administrative preclearance provisions of Section 5 provide generally that the chief legal officer or other appropriate officer of a covered jurisdiction (including a political subdivision of a State) shall make submissions on behalf of that jurisdiction. 28 C.F.R. 51.23. When voting in one or more covered political subdivisions in a State will be affected by state legislation, the guidelines permit the State to make the Section 5 preclearance submission on behalf of the covered subdivisions. *Ibid.*[2]

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[1] Ten other States were at one time partially covered by Section 5 in similar fashion but are no longer covered because they successfully obtained a declaratory judgment under the "bailout" provision of Section 4(a) of the Voting Rights Act, 42 U.S.C. 1973b(a), terminating coverage under Section 5.

[2] During the time in which political subdivisions in the seven partially covered States have been subject to the preclearance requirements of Section 5, at least 1300 state laws affecting voting in covered political subdivisions in those States have been submitted to the Department of Justice for preclearance. The Department has declined to make determinations under Section 5 when the submitted state legislation has no effect on voting in any of the covered counties.

2. On November 1, 1968, Monterey County had nine inferior trial court districts. Two of the districts were municipal court districts, each served by two judges. The other seven court districts were justice court districts, each served by a single judge. As constituted at that time, municipal courts served jurisdictions of more than 40,000 people; justice courts, which were served by part-time judges who did not need to be members of the bar, were not courts of record. 117 S. Ct. at 343; see generally D. Minteer, *Trial Court Consolidation in California*, 21 UCLA L. Rev. 1081, 1083-1090 (1974). Each of the municipal and justice courts operated independently. Judges for each court were elected by the voters of their respective districts, and served only the judicial district in which they were elected. *Lopez*, 117 S. Ct. at 343-344.

Under a California law enacted in 1949, the state legislature delegated to the board of supervisors of each county the authority to divide counties into judicial districts, as well as to change district boundaries and create new districts. Cal. Gov't Code Ann. § 71040 (West 1997); Minteer, *supra*, 21 UCLA L. Rev. at 1083 n.12. Under that authority, Monterey County adopted between 1972 and 1983 six court consolidation ordinances that ultimately merged the seven justice court districts and the two municipal court districts into a single, county-wide municipal court that was served by nine judges whom Monterey County residents elected at large.[3] During the same period, the

[3] See generally J.S. App. 90-95. On November 1, 1968, Monterey County had seven justice and two municipal court districts. Monterey County Ordinance No. 1917, adopted in 1972, consolidated two of the justice courts, leaving two municipal and six justice courts. J.S. App. 56-57. Ordinance No. 1999, adopted in 1973, again consolidated two justice courts, leaving two municipal and five justice courts. J.S. App. 58-59. Ordinance No. 2139, adopted in 1976, adjusted boundaries of the municipal courts and two justice courts and consolidated three of the justice courts with the municipal courts, leaving two municipal courts and two justice courts. J.S. App. 62-64. Section 5 of Ordinance No. 2212, adopted in 1976, established a new justice court, leaving two municipal and three justice courts. J.S. App. 68-70. In 1977, a state statute was enacted that converted one of the county's justice courts into a municipal court. J.S. App. 30. Ordinance No. 2524, enacted in 1979, consolidated the three municipal courts into one municipal court, and did not affect the two justice courts. J.S. App. 74-76. The final consolidation ordinance, Ordinance No. 2930, consolidated the two remaining justice courts with the municipal court, resulting in one county-wide inferior trial court, Monterey County Municipal Court, served by nine judges. J.S. App. 77. A tenth judge was added by a county resolution enacted in 1988. J.S. App. 81-82.

County also passed other ordinances changing the boundaries of the various judicial districts. See J.S. App. 90-94. The County did not seek Section 5 preclearance for any of these changes affecting voting. *Lopez*, 117 S. Ct. at 344.

Some of the County's changes to its judicial districts were subsequently enacted into state law. *Lopez*, 117 S. Ct. at 344 & n.*. For example, on June 5, 1979, the Monterey County Board of Supervisors adopted Ordinance No. 2524, which consolidated the Monterey Peninsula Judicial District, the North Monterey County Judicial District, and the Salinas Judicial District into a single municipal court district to be called the Monterey County Municipal Court District. J.S. App. 74-75. As a result of that consolidation, the County was left with one municipal court district and two justice courts. Later that year, the State enacted that consolidation into law when the California legislature amended Section 73560 of the California Government Code. 1979 Cal. Stat. ch. 694; J.S. App. 32-33.

Similarly, on August 2, 1983, Monterey County enacted Ordinance No. 2930, which consolidated the last two justice court districts with the remaining municipal court district in Monterey County, and the State subsequently passed legislation authorizing that consolidation. *Lopez*, 117 S. Ct. at 344; J.S. App. 34-35, 94. That state legislation was enacted in September 1983 after the County requested the assistance of the state legislature in passing "our [the County's] municipal court staffing bill." Exh. 15 to Plaintiffs' Motion for Summary Judgment (Oct. 9, 1992), App., *infra*, 1a. In addition, 12 years after Monterey County eliminated its justice courts, the State adopted a constitutional amendment eliminating all justice courts. Cal. Const. art. VI, § 5; J.S. App. 8.

Although the County did not submit for preclearance any of the ordinances reorganizing its judicial election system, the State did submit for preclearance the 1983 state law reflecting the changes enacted in County Ordinance No. 2930 (consolidation of the last two justice court districts with the single remaining municipal court district). *Lopez*, 117 S. Ct. at 344; J.S. App. 34-35. In response to the Attorney General's request for additional information about the state law, the State submitted Ordinance No. 2930. The State did not, however, bring the previous consolidation ordinances to the Attorney General's attention. *Lopez*, 117 S. Ct. at 344-345. Thus, the only voting change affecting Monterey County that was submitted for preclearance was the consolidation of the last two remaining justice courts with the municipal court, which by that time had been unified as a result of the prior ordinances that had never been precleared. This Court found on the prior appeal that, although the Attorney General's failure to object to the 1983 legislation may

have precleared that ultimate consolidation, the Attorney General had not precleared the previous consolidations. *Id.* at 345.

3. On September 6, 1991, appellants brought this action in the United States District Court for the Northern District of California, alleging that the County was in violation of Section 5 by holding judicial elections under ordinances that had never received either administrative or judicial preclearance. On March 31, 1993, the district court held that the consolidation ordinances were voting changes that had not been precleared as required by Section 5, and it directed the County to seek preclearance. The County then brought a judicial preclearance action in the United States District Court for the District of Columbia, but voluntarily dismissed that action after stipulating that it was unable to show that the ordinances did not have a retrogressive effect on Latino voters. *Lopez*, 117 S. Ct. at 345.

Although the County and appellants reached tentative agreement on new election plans and submitted several such plans to the district court for review, the State objected to the plans because (it contended) the plans would contravene state constitutional provisions prohibiting division of cities into separate municipal court districts and requiring electoral and jurisdictional bases of municipal court judgeships to be coextensive. See Cal. Const. art. VI, §§ 5(a), 16(b). After further proceedings revealed that the parties could not agree on a new election plan, the district court, on December 20, 1994, adopted on an interim basis one of the plans that the County and appellants had proposed. That plan contained three single-judge districts in which Hispanics constituted a majority, and a fourth

district that would elect seven judges. The Attorney General precleared the plan for use on an interim basis, and it was used in a June 1995 special election of seven judges. See *Lopez*, 117 S. Ct. at 346.

Shortly after the June 1995 election, this Court decided *Miller* v. *Johnson*, 515 U.S. 900 (1995), which held that a congressional redistricting plan for the State of Georgia violated the Equal Protection Clause. After that decision, the district court reconsidered its interim election plan. *Lopez*, 117 S. Ct. at 346. Finding that *Miller* had cast doubt on the constitutionality of the interim plan, the court ordered the County to hold the next judicial election in March 1996 as an at-large, county-wide election—the very scheme that appellants had originally challenged under Section 5 as unprecleared. *Ibid.*

4. This Court reversed, and held that the district court did not have authority to order elections pursuant to ordinances that had not been precleared under Section 5. *Lopez*, 117 S. Ct. at 348-349. The Court rejected the State's argument that the plan for at-large elections in March 1996 did not have to be precleared because it had been adopted pursuant to the district court's equitable remedial authority. The Court explained that, "where a court adopts a proposal reflecting the policy choices of the people in a covered jurisdiction[,] the preclearance requirement of the Voting Rights Act is applicable." *Id.* at 348. (internal quotation marks, ellipses, and brackets omitted). The Court concluded that preclearance was necessary here because the "at-large, county-wide system under which the District Court ordered the County to conduct elections undoubtedly reflected the policy choices of the County; it was the same system that the County had adopted in the first place." *Ibid.* (internal quotation marks and brackets omitted).

The State also contended on the previous appeal in this case that "intervening changes in California law have transformed the County's judicial election scheme into a state plan. Therefore, assert[ed] the State, the County is not administering County consolidation ordinances, * * * but is merely implementing California law, for which § 5 preclearance is not needed." *Lopez*, 117 S. Ct. at 347. This Court declined to address that contention; it noted that the district court had not made a conclusive determination on that issue and had stated that it would allow the State to "continue to seek to show that the County was merely administering California law." *Ibid.* The Court therefore left that issue, along with several others that the lower court had not yet addressed, to be resolved on remand. *Ibid.* The Court stressed, however, that "[t]he County has not discharged its obligation to submit its voting changes to either of the forums designated by Congress," and directed that "[t]he requirement of federal scrutiny should be satisfied without further delay." *Id.* at 349.

5. On remand, the State filed a motion to dismiss, arguing that, "although the consolidation ordinances were not submitted for preclearance, intervening changes in California law have converted the County's judicial election scheme into a state plan thus negating the need for preclearance." J.S. App. 3. The district court agreed with the State that Section 5 does not require preclearance of a partially covered State's laws that affect covered political subdivisions in that State, and dismissed appellants' complaint. *Id.* at 6-10.

The district court acknowledged that "a number of county ordinances did consolidate judicial districts" before enactment of the 1979 state statute codifying that consolidation, but, it concluded, "by the amendment [to state law], the State clearly dictated that Monterey County would have a single municipal court district." J.S. App. 7.

Furthermore, the court stated, the State had continued to change the County's court system in subsequent enactments. The 1983 statute that the Attorney General had precleared, for example, had increased the number of judges in the County's court system, contingent on the County's consolidation of municipal and justice courts (which was done by county ordinance in 1983), and the state constitutional amendment in 1995 had converted justice courts to municipal courts. *Id.* at 7-8. The court reasoned that "the justice courts as they existed prior to consolidation could not exist today," and that the entire consolidation should therefore be viewed as the product of state law. *Id.* at 8.

The court rejected appellants' argument that, even though the State had enacted various statutes regarding county-wide judicial election districts in Monterey County, Section 5 still required preclearance because the County "seek[s] to administer" those voting changes, within the meaning of Section 5, by holding elections under the state plans. The court acknowledged that in *Young* v. *Fordice*, 117 S. Ct. 1228 (1997), this Court held that Mississippi, which is covered by Section 5, was required to obtain preclearance of voting changes that it intended to administer in order to comply with another federal statute. But in the present case, the court stated, appellants "are not objecting to any particular procedural plan by which the County intends to administer voting for a county-wide district. They are objecting to the consolidation itself." J.S. App. 9. And, the court reasoned, "[a]lthough neither the Voting Rights Act nor any case specifically defines 'seek(s) to administer,' it is clear that it must involve some exercise of policy choice and discretion by the covered jurisdiction. The County, as a subordinate jurisdiction of the State, lacks the discretion to

choose a voting plan that does not involve a county-wide district." *Ibid.* (citation omitted).

The district court vacated its previous orders extending the terms of the incumbent judges and enjoining elections under the unprecleared ordinances. J.S. App. 9-10. On January 23, 1998, this Court issued a stay of the district court's order. J.S. 7.

SUMMARY OF ARGUMENT

The district court erred in holding that a political subdivision covered by Section 5 of the Voting Rights Act need not obtain preclearance under the Act of changes in voting practices that it administers if those voting changes also are enacted into law by a State that is not, as a State, covered by Section 5. That decision is contrary to the plain language of Section 5, which requires preclearance whenever a covered political subdivision either "enact[s] or seek[s] to administer" a voting change. The statutory language is phrased in the disjunctive, indicating that preclearance is required both when a covered political subdivision enacts a voting change, and when such a jurisdiction seeks to administer a voting change. That reading of the statute is also consistent with differences between the ordinary meanings of the words "enact" and "administer." Under Section 5, therefore, a covered political subdivision is required to obtain preclearance before administering a voting change effective in that subdivision, even if authorization for that change has been enacted into law at the state level. In the case of Monterey County, the fact that the State of California subsequently ratified the County's consolidation of its judicial districts did not obviate the County's obligation to preclear these changes when it sought to administer the consolidation of the districts.

That straightforward approach to the language of Section 5 is further supported by the legislative background to the extension of the Voting Rights Act in 1982. Before that congressional action, the Attorney General had already interpreted Section 5 to require preclearance of voting changes enacted into law at the statewide level in partially covered States, insofar as those voting changes were to be administered in covered political subdivisions within such States. The legislative history of the 1982 extension cited specific examples of voting changes in partially covered States that required preclearance because they were to be administered in covered political subdivisions, in agreement with the Attorney General's construction. Because Congress then reenacted Section 5 without change, it codified the Attorney General's construction of Section 5 into law.

The Attorney General's construction of Section 5 is, moreover, entitled to deference in light of the Department of Justice's central role and long practical experience in administering and enforcing Section 5. In particular, that experience demonstrates that the district court's decision could have serious, adverse implications for the effectiveness of Section 5. The lower court's decision suggests that local jurisdictions could easily evade the coverage of Section 5 simply by requesting that state entities enact county voting changes into state law (at least in States that are not covered as States by Section 5). That potential loophole is reminiscent of the problem that the Court perceived in *United States* v. *Board of Commissioners of Sheffield*, 435 U.S. 110 (1978), where it held that all political jurisdictions within a covered State that have any power over the electoral process are also covered by Section 5; otherwise, the Court concluded, a covered State could evade the preclearance mandate of Section 5 by routing its voting changes through its political subunits

that were not independently covered. Given Congress's particular concern, in enacting Section 5, that minority voting rights not be infringed through ingenious devices, the Court has always construed Section 5 to ensure that its preclearance requirements are not evaded through mechanisms that could have the effect of diluting its protections. That settled interpretive approach to Section 5 requires rejection of the district court's construction.

The district court also erred in concluding that preclearance was not required because the voting changes at issue in this case did not reflect the policy choices of the County (which was the source of the judicial district consolidations) but rather those of the State (which ratified the County's actions). That ruling is flawed in both its factual premise and its legal conclusion. As a factual matter, this Court has already determined on the previous appeal in this case that the voting changes "undoubtedly reflected the policy choices of the County." *Lopez* v. *Monterey County*, 117 S. Ct. 340, 348 (1996) (internal quotation marks and brackets omitted). That determination is clearly correct; the record demonstrates that the impetus for the court consolidations came from the County, even though the consolidations were also codified by the State. As a legal matter, even if the voting changes had been enacted by the State without regard to the policy choices of the County, Section 5 would require preclearance when the County sought to administer the voting changes. This case does not require the Court to address that situation, however, because in this case the record is clear that the source of the voting changes was the County, and that the State enacted the voting changes into state law only after the County had adopted them.

ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING THAT MONTEREY COUNTY WAS NOT REQUIRED TO OBTAIN PRECLEARANCE UNDER SECTION 5 OF THE VOTING RIGHTS ACT BEFORE IMPLEMENTING CHANGES IN THE BOUNDARIES OF THE COUNTY'S JUDICIAL ELECTION DISTRICTS

A. Section 5 Requires Preclearance Of Any Change Affecting Any Voting Practice That Is Administered By A Covered Jurisdiction, Whether Or Not That Jurisdiction Also Enacted The New Practice

1. Section 5 of the Voting Rights Act requires preclearance by either the Attorney General or the United States District Court for the District of Columbia whenever a covered "State or political subdivision * * * shall enact or seek to administer any [voting change]."[4] As an

[4] More completely, Section 5 provides in pertinent part:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in [Section 4(a) of the Act] based upon determinations made under the first sentence of [Section 4(b) of the Act] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on * * * November 1, 1968, * * * such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, [or membership in a language minority group] * * *: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission.

42 U.S.C. 1973c.

initial matter, it is undisputed that Monterey County is a "political subdivision" separately covered by Section 5, even though the State of California is not covered. See 28 C.F.R. Pt. 51 App. The Act's legislative background reflects that Congress specifically intended that Section 5 apply to "political subdivision[s]" within States not covered as a whole by Section 5, to ensure that voting changes in such subdivisions receive scrutiny under the Act. See *United States* v. *Board of Comm'rs of Sheffield*, 435 U.S. 110, 128-129 (1978) (*Sheffield*).

Because Monterey County is covered by Section 5, under the plain terms of the Act it must obtain federal preclearance before it "shall enact or seek to administer" a voting change. The language is not limited to situations—as the district court seemed to believe—in which a covered jurisdiction "seek[s] to administer" a voting change that it has enacted itself. To the contrary, the plain language of Section 5 encompasses the situation in which a covered political subdivision "seek[s] to administer" a voting change that has been enacted by the legislature of a State that is not, as a State, covered by the Act.

By using the disjunctive—"enact" *or* "seek to administer"—Congress clearly intended that those terms have different meanings in the statute. See *Bailey* v. *United States*, 516 U.S. 137, 145-146 (1995). That intent is consistent with differences between the ordinary meanings of "enact" and "administer." The term "enact" ordinarily refers to the process by which a legislative body votes a bill into law. See *Black's Law Dictionary* 472 (5th ed. 1979) (defining "enact" as "[t]o establish by law" and "enactment" as "[t]he method or process by which a bill in the

Legislature becomes a law"); *Webster's Third New International Dictionary* 745 (3d ed. 1986) (def. 2 of "enact": "to establish by legal and authoritative act: make into a law; *esp.*: to perform the last act of legislation upon (a bill) that gives the validity of law"). The term "administer," however, more commonly refers to the implementation of an established legal requirement. See *id.* at 27 (def. 1a(2) of "administer": "to direct or superintend the execution, use, or conduct of"; as in "[administered] the regulations governing interstate travel"); *Black's Law Dictionary*, *supra*, at 41 ("[t]o manage or conduct"). Under the plain language of Section 5, therefore, a covered political subdivision "seek[s] to administer" a voting change even when it executes a law enacted by the legislature of a State that is not covered by Section 5. The covered political subdivision must therefore obtain preclearance of a voting change enacted pursuant to state law before such a change may take effect within the covered jurisdiction.[5]

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[5] Somewhat different considerations apply when a political subunit administers a voting law enacted by the legislature of a State that is wholly covered by Section 5. In that situation, the State must obtain preclearance of the voting change before it can be implemented. If the voting change enacted by the State is precleared, and if the subdivision has no discretion under state law to deviate from the enacted voting change, then the subdivision need not also obtain preclearance before it is implemented. Once the state enactment has been precleared, its implementation by subdivisions required to follow state law does not involve a change in voting practices. See *City of Monroe* v. *United States*, 118 S. Ct. 400, 402 (1997) (because state law requiring implementation of majority-vote rule in a political subunit had been precleared, the subunit was not also required to seek preclearance before implementing the majority-vote rule). For example, if a covered State enacted a voting law changing the hours during which polling places are open, without affording subunits discretion to deviate from that rule, and if that enactment were precleared (and if it were clear from the State's submission that the change applied to the subunit), then the law would not also have to be precleared by each subunit that implemented the law. In that situation, the actual change affecting voting would have been submitted for preclearance by the State. By contrast, preclearance of state legislation that is merely enabling in nature, and that affords political subdivisions discretion in its implementation, does not absolve the subdivisions of their responsibility to preclear any changes they implement pursuant to such enabling legislation. See *Texas* v. *United States*, 118 S. Ct. 1257, 1260 (1998).

2. The district court concluded that a covered political subdivision need not seek preclearance when it administers a law enacted by a partially covered State. The court reasoned that, because Section 5 applies only to covered jurisdictions, and because the State is not covered as a State, the language of Section 5 "does not apply to an uncovered state which 'enact(s) or seek(s) to administer' a voting plan in a subordinate, covered county." J.S. App. 5. In the court's view, moreover, "the purpose of § 5 appears to be to target only those enactments by jurisdictions suspected of abridging the right to vote and not those put in force by a non-covered, superior jurisdiction." *Ibid.* The court therefore framed the question before it as "whether the State of California, rather than the County, 'enact(ed)' and [']seek(s) to administer' the county-wide voting plan in Monterey County." *Ibid.*

The district court's analysis is fundamentally in error. First, the court used the statutory terms "enact" and "seek to administer" interchangeably; it ignored the fact that the coverage of Section 5 is phrased in the disjunctive, and it addressed only the situation in which the State enacted and administered its own legislation, failing even to consider the possibility that the County might administer a law enacted by the State. As we have explained above, however, Congress's use of both terms indicates that it intended the terms to have different meanings,

and the ordinary meaning of "administer" (unlike "enact") certainly encompasses a political subdivision's implementation of laws enacted by other authorities. See *Bailey*, 516 U.S. at 146 ("We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.").

This Court has previously recognized that "enact" and "seek to administer" describe distinct events. In *Perkins* v. *Matthews*, 400 U.S. 379 (1971), the Court confronted a voting change that had been enacted prior to the date specified in the Voting Rights Act, and implemented both before and after that date. In 1962, Mississippi enacted a state statute mandating a change in aldermanic elections from a ward system to an at-large system. The Voting Rights Act required preclearance of voting changes "enacted" or "administered" in Mississippi after November 1, 1964. The City of Canton, Mississippi, did not change its aldermanic election scheme as required by the state statute until 1969. The Court held that the City was required to obtain preclearance of the voting change that it sought to administer after November 1, 1964, even though the change had been made pursuant to a state statute enacted before that date, and the enactment therefore was not itself subject to the preclearance requirement. *Id.* at 394-395. See also *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 178 (1985) (noting that even other changes occasioned by "an administrative effort to comply with a statute that had already received clearance" may themselves require preclearance).

Second, the district court mistakenly believed that Section 5 is directed only at those entities that are themselves suspected of discrimination, and that preclearance is necessary only if the voting change is most directly caused by a suspect jurisdiction. J.S. App. 5. Section 5

protects minority voters who reside within a covered political subdivision by denying preclearance of voting changes that have the purpose or effect of abridging their right to vote, irrespective of the source of the law that causes the discrimination. Cf. *Dougherty County Bd. of Educ.* v. *White*, 439 U.S. 32, 47 (1978) ("Congress was determined * * * to provide some mechanism for coping with all potentially discriminatory enactments whose *source* and forms it could not anticipate but whose impact on the electoral process [in a covered jurisdiction] could be significant.") (emphasis added). Under the Act, moreover, it is not the prerogative of a local three-judge court, which is charged only with determining whether changes must be submitted for preclearance, to make assumptions regarding the purposes behind those voting changes. See *Perkins*, 400 U.S. at 384-385. Rather, "[i]t is change that invokes the preclearance process." *Young* v. *Fordice*, 117 S. Ct. at 1236 (emphasis omitted).

3. The Attorney General has consistently construed Section 5 to require preclearance when a covered political subdivision "seek[s] to administer" an enactment of a partially covered State.[6] That construction is entitled to deference. The Court has given "particular deference" to

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[6] The Attorney General has consistently taken that position in litigation and has consistently prevailed. See, *e.g.*, *United States* v. *Onslow County*, 683 F. Supp. 1021 (E.D.N.C. 1988) (local legislation enacted by North Carolina General Assembly requiring staggered terms for county commissioners in a covered political subdivision held subject to preclearance requirement); *Haith* v. *Martin*, 618 F. Supp. 410 (E.D.N.C. 1985) (North Carolina legislation changing superior court judge election system held subject to preclearance requirement in 40 counties covered by Section 5), aff'd mem., 477 U.S. 901 (1986); *United States* v. *South Dakota*, Civ. No. 79-3039 (C.D.S.D. May 21, 1980) (South Dakota legislation affecting organization of elected officials in State's two covered counties is subject to preclearance requirement).

the Attorney General's construction of Section 5 in light of her "central role" in implementing the statute. *Dougherty County*, 439 U.S. at 39; see also *Hampton County*, 470 U.S. at 178-179; *Sheffield*, 435 U.S. at 131. In this case, the Attorney General's construction is not only fully consistent with "the broad scope suggested by the language of the Act," *id.* at 122, but also reflects practical concerns about the effective operation of the Act, should Section 5 be construed not to cover situations like the present one. As we explain below (pp. 22-25, *infra*), the district court's construction of Section 5 creates a significant loophole in the coverage of the Act. That loophole, if not closed, could deprive minority voters in covered political subdivisions of much of the valuable protection of their voting rights that is provided by the preclearance mechanism. This Court has recognized the need for strong effectuation of Congress's protection of voting rights in Section 5, and so has "consistently adhered to * * * principles of broad construction" of that statute. *Dougherty County*, 439 U.S. at 38. The district court's interpretation of the Act is inconsistent with those principles, and accordingly should be rejected.

4. Congress ratified the Attorney General's interpretation of Section 5 in 1982, when it extended Section 5 without change, and noted the Attorney General's interpretation with recognition and approval in the accompanying Senate Report.[7] Cf. *Sheffield*, 435 U.S. at 131-135 (relying on similar congressional ratification in 1975 of Attorney General's construction of Section 5). The Senate

[7] There was no conference report on the 1982 extension of the Voting Rights Act; the House of Representatives adopted the version of the legislation passed by the Senate. See 128 Cong. Rec. 14,933-14,940 (1982). The Court has described the Senate Report as the "authoritative source" of the legislative history for the 1982 extension of the Act. *Thornburg* v. *Gingles*, 478 U.S. 30, 43 n.7 (1986).

Report accompanying the 1982 extension of Section 5 expressed concern that, since the Act was passed in 1965, "covered jurisdictions ha[d] substantially moved from direct, over[t] impediments to the right to vote to more sophisticated devices that dilute minority voting strength," including "the use of at-large elections" and "the redistricting of boundary lines." S. Rep. No. 417, 97th Cong., 2d Sess. 10-11 (1982). The Report cited several examples of the Attorney General's objections to laws in partially covered States, including a North Carolina congressional redistricting plan "that minimized the voting strength of black voters in the Durham area" and "a South Dakota law that would have nullified the effect of a judicial decision that gave the [predominantly Indian] residents of two unorganized counties * * * the right to vote for county officials in the organized counties to which they [were] attached." *Id.* at 11 (footnote omitted). In the Committee's view, moreover, the "breadth of the continuing problem [was] perhaps best shown by the section 5 objections to statewide redistricting plans following the 1980 census," *id.* at 12, and the Report specifically mentioned the statewide redistricting plan enacted by the State of North Carolina, which is only partially covered.

The Senate Report also expressed concern that, "[i]n addition to the continuing level of objectionable voting law changes, disappointing gaps in compliance with Section 5 are significant evidence of the continuing need for the preclearance requirement." S. Rep. No. 417, *supra*, at 12. The Report cited 750 state enactments in six States that were not submitted for preclearance, and noted that, "[w]hile North Carolina, as a State, is not subject to section 5, the legislation in question affected North Carolina counties which are covered and, therefore, it should have been precleared." *Id.* at 12 & n.32.

The Senate Report thus reflects congressional agreement with the Attorney General that voting changes applicable to a covered political subdivision within a State but enacted by a State not independently subject to Section 5 must be precleared before they may be enforced within the covered jurisdiction. Cf. *Sheffield*, 435 U.S. at 132-134 (relying on similar congressional agreement with Attorney General's construction of Section 5 as applicable to all political subunits of a covered State). As in *Sheffield*, "the legislative background" of the 1982 extension of the Act is "conclusive of the question" before the Court, for "[w]hen a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation." *Id.* at 134.

B. The District Court's Construction Of Section 5 Would Allow Covered Political Subdivisions To Evade Its Requirements

As the Court has long recognized, the Voting Rights Act "was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race." *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 501 (1992) (quoting *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 565 (1969)). The Court has therefore construed Section 5 to ensure that its preclearance requirements are not evaded through devices that could have the effect of diluting its protections. *Sheffield*, 435 U.S. at 123; see also *South Carolina* v. *Katzenbach*, 383 U.S. 301, 335 (1966) (noting that "Congress had reason to suppose that [covered jurisdictions] might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself"); S. Rep. No. 295, 94th Cong., 1st Sess. 15 (1975) (similar). Thus, "Section 5 of the Act requires review of all voting changes prior to implementation by the covered jurisdictions." *Ibid.*

The district court's construction of Section 5, if not rejected, would create a serious loophole in the Act in partially covered States. Under the district court's construction, a political subdivision covered by Section 5 could effectively evade the preclearance requirement through the simple expedient of requesting that the state legislature validate its voting changes through state enactments of local legislation. Under the practice of "local courtesy" that prevails in many state legislatures, state legislators customarily approve legislation applicable to only one political subdivision when it is sponsored by that subdivision's legislative delegation. "In many state legislatures, approval is given without question or dissent to any purely local bill that has the support of any and all legislators from the county concerned." D. Lawrence, *Local Government Officials as Fiduciaries: The Appropriate Standard*, 71 U. Det. Mercy L. Rev. 1, 27 n.91 (1993) (quoting M. Jewell & S. Patterson, *The Legislative Process in the United States* 240 (3d ed. 1977)).[8]

Indeed, in this case it appears that the California legislature ratified Monterey County's 1983 court consolida-

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[8] See also B. Miller, *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics, and the Voting Rights Act*, 102 Yale L.J. 105, 121, 128-131 (1992) (discussing local courtesy). The Court has expressed its awareness of the custom of local courtesy. See *Rogers* v. *Lodge*, 458 U.S. 613, 626 (1982) (noting that the "maintenance of [a Georgia] state statute providing for at-large elections in Burke County is determined by Burke County's state representatives, for the legislature defers to their wishes on matters of purely local application"); *City of Mobile* v. *Bolden*, 446 U.S. 55, 74 n.21 (1980) (plurality opinion); *Reynolds* v. *Sims*, 377 U.S. 533, 580-581 (1964) ("In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions.").

tion ordinance as a routine matter of local courtesy. The state legislature's amendment of the California Government Code to reflect the changes that the County had made in Ordinance 2930 followed the County's request for such state legislation by less then two months. J.S. App. 34-35; App., *infra*, 1a. The state law that followed, moreover, was not a statute of general applicability but was directed specifically to Monterey County, providing that "at such time as the Central and South Justice Court District are consolidated with the Monterey County Municipal Court District, there shall be nine judges of the Monterey County Municipal Court District." 1983 Cal. Stat. ch. 1249; J.S. App. 35. Under the construction of Section 5 advanced by respondents and accepted by the district court, the fact that the County, with the assistance of state legislators representing that area, persuaded the state legislature to ratify its consolidation ordinance would render that ordinance immune from scrutiny under Section 5.

The potential gap in coverage created by the district court's construction of Section 5 is similar to the loophole that the Court closed in *Sheffield*, and the Court should reverse here for the same reason. In that case, the Court confronted the danger that a covered State containing noncovered political subunits could evade Section 5 by implementing its voting changes through its noncovered subunits. 435 U.S. at 125. The Court construed the statute to avoid that danger, holding that, within a State covered by Section 5, all political subunits that have any power over any aspect of the electoral process are also covered by Section 5. *Id.* at 118. Justice Powell agreed with the Court's construction of Section 5 in that case because, otherwise, "[a] covered State or political subdivision * * * could achieve through its instrumentalities what it could not do itself without preclearance." *Id.*

at 139 (Powell, J., concurring in part and concurring in the judgment).

In this case the Court confronts the reverse danger: that a covered political subdivision might evade Section 5 by implementing its voting changes through the State legislature, with the aid of the local legislative delegation. Once again the Court should construe the statute to avoid the possibility of evasion, recognizing that a subdivision may "seek to administer" a voting change within the meaning of Section 5 whether the legislation establishing that voting change is enacted at the state or local level.

Indeed, if the district court were correct in its view that the legislation enacted at the state level is exempt from the Section 5 preclearance requirement in a partially covered State, then in such a State the preclearance requirement would not apply to a statewide legislative redistricting plan with a discriminatory effect on residents of a covered political subdivision. Thus, under the district court's interpretation, the redistricting plan at issue in *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977), and the North Carolina redistricting plan mentioned in the Senate Report accompanying the 1982 extension of Section 5 (see p. 21, *supra*) might not have been subject to the Section 5 preclearance requirement because North Carolina and New York, as States, are not covered by Section 5, even though counties affected by the restricting plans were covered. Congress could not have intended to permit the protections of Section 5 to be circumvented so easily.

C. The District Court Also Erred In Concluding That Section 5 Did Not Apply Because The Changes In The County's Judicial Districts Were Nondiscretionary, Or Did Not Reflect The Policy Choices Of The County

In dismissing this case, the district court concluded that preclearance is not required because Monterey County now "lacks the discretion to choose a voting plan that does not involve a county-wide district." J.S. App. 9. The district court evidently believed that the decision to consolidate the courts in Monterey County could not be attributed to the County itself. That rationale is unavailing for two reasons.

First, even if the district court's inquiry into the exercise of discretion might have merit in another case, it is plainly misplaced here, for this Court has already found that the decision to consolidate the judicial districts in Monterey County was that of the County itself. This Court concluded, on the first appeal in this case, that the "at-large, county-wide system under which the District Court ordered the County to conduct elections undoubtedly reflected the policy choices of the County; it was the same system that the County had adopted in the first place." *Lopez* v. *Monterey County*, 117 S. Ct. 340, 348 (1996) (internal quotation marks and brackets omitted). That conclusion remains correct. On remand, the district court acknowledged that, even before the California legislature moved in 1979 to require a single municipal court district in the County, "a number of county ordinances did consolidate judicial districts." J.S. App. 7. Therefore, this case presents a circumstance in which a covered subdivision adopted voting changes that the State later codified in state law; the County exercised discretion in adopting those changes in the first instance. The voting changes at issue here therefore reflected the policy

choices of the covered political subdivision, the County (see *Lopez*, 117 S. Ct. at 348), whether or not they *also* reflected the policy choices of the State.[9]

Second, the district court's approach to Section 5 is legally flawed, because Section 5 expressly requires a covered political subdivision to obtain preclearance whenever it seeks to administer *any* voting change. See 42 U.S.C. 1973c (requiring preclearance "whenever a [covered] State or political subdivision * * * shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on [certain dates]"). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 117 S. Ct. 1032, 1035 (1997) (citation omitted). The statute on its face contains no exemption for changes that might be described as "non-discretionary." The 1982 Senate Report also reflects agreement with that straightforward approach to the Act's language. See S. Rep. No. 417, *supra*, at 12 (recognizing that statewide redistricting plans, which allow the covered political subdivisions no discretion in the implementation of the new district boundary lines, are

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[9] The district court also noted that a 1995 amendment to the California Constitution converted all justice courts into municipal courts (J.S. App. 8), but it appears to have misapprehended the relation of that amendment to this case. The constitutional amendment did not effect any change with respect to voting in Monterey County. As we noted above (pp. 5-7, *supra*), state legislation and county ordinances had consolidated the justice courts and municipal courts in Monterey County more than a decade before that constitutional amendment, and the Attorney General precleared the final consolidation in Monterey County (although not the consolidations preceding it). See *Lopez*, 117 S. Ct. at 344-345.

subject to the preclearance requirements when they effect changes in covered jurisdictions).

This case does not require the Court to address whether Section 5 preclearance is required when a State that is not separately covered as a State enacts a voting change into law *without* exercising or considering the policy choices of a covered political subdivision, and the covered subdivision is afforded no discretion in administering that law. If the Court reaches that question, however, it should conclude that such changes must be precleared in the covered subdivision.[10] In its previous cases concerning voting changes mandated by the legislatures of partially covered States, this Court has assumed that such changes are so covered if they affect voting practices in covered

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[10] Section 5 by its plain language requires preclearance in such a situation; the statutory language contains no indication that there is some category of "nondiscretionary" voting changes required by state law that a covered jurisdiction may enforce without preclearance. In *Young* v. *Fordice*, 117 S. Ct. at 1239, the Court suggested that, when a covered jurisdiction seeks to administer a federal law, Section 5 preclearance may not be necessary if the covered jurisdiction has no discretion as to how it may implement that federal law. That suggestion in *Young* is irrelevant to this case, for this case involves local implementation of a state law, not a State's implementation of a federal law. It may be doubtful whether Congress intended in the Voting Rights Act to require preclearance of its own enactments or of a State's nondiscretionary, ministerial implementation of them. The Court in *Young* did not reach that issue because it concluded that the National Voter Registration Act of 1993, 42 U.S.C. 1973gg *et seq.*, the statute at issue in *Young*, requires the States to exercise discretion in its implementation; the Court therefore did not need to decide whether Section 5 would require preclearance of a federal law that gave the covered jurisdiction no discretion in its implementation. But the rationale for questioning coverage of a ministerial implementation of federal law—namely, that Congress has already had the opportunity to determine that the new law is consistent with the Voting Rights Act—has no application to a law enacted by a State rather than by Congress.

political subdivisions. For example, in *United Jewish Organizations* v. *Carey*, 430 U.S. at 156-157, the Court explained that when New York, a State that is partially covered by Section 5, enacted statutes requiring redistricting of counties, those statutes were subject to Section 5's preclearance mandates insofar as they affected counties that had been determined to be covered political subdivisions. See also *Shaw* v. *Hunt*, 517 U.S. 899, 912-913 (1996) (involving redistricting statute enacted by North Carolina, a partially covered state); *Gingles* v. *Edmisten*, 590 F. Supp. 345, 350-351 (E.D.N.C. 1984) (similar), aff'd in part, rev'd in part, 478 U.S. 30 (1986). No persuasive reason has been presented in this case for adopting a different reading of the language of Section 5.

* * * * *

For the reasons discussed above, the district court's judgment is clearly in error. Monterey County administered the first of the unprecleared changes at issue more than 25 years ago. Congress enacted Section 5 to require preclearance *before* voting changes could be enforced to prevent the kind of delay in the adjudication of voting rights that has occurred here. See *Hampton County*, 470 U.S. at 175 n.19. In its earlier decision in this case, the Court admonished that "[t]he requirement of federal scrutiny should be satisfied without further delay." *Lopez*, 117 S. Ct. at 349. That requirement should be satisfied forthwith.

CONCLUSION

The judgment of the district court should be reversed and the case remanded for the entry of appropriate relief.

Respectfully submitted.

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JUNE 1998

APPENDIX

MONTEREY COUNTY
INTERGOVERNMENTAL AFFAIRS
[address illegible]

[Seal Omitted]

MICHAEL D. JOHNSON
DEPUTY COUNTY ADMINISTRATIVE OFFICER

August 4, 1983

Senator Henry Mello
State Capitol
Room 5308
Sacramento, CA 95822

Dear Henry:

The Monterey County Board of Supervisors on August 2, 1983, approved the consolidation of our Justice Court and Municipal Court systems by annexing the Central and Southern Justice Court Districts to the Monterey County Municipal Court District. The merger is to become effective December 31, 1983. Additionally, the Board has approved the conversion of the existing two justice court judgeships into Municipal Court judgeships. Consequently, I have been directed to seek, with your support and sponsorship, as amendment to SB 676 which is our municipal court staffing bill.

During the past few weeks we have been working with Carol Ross, of your staff, and Rubin Lopez, consultant to the Assembly Judiciary Committee. We understand our

court merger is identical to one recently approved in Fresno County, which took similar legislative action.

I am attaching a copy of the Board Resolution approving the above referenced merger, as well as the Board's request for legislation to convert the two Justice Court Judges to Municipal Court Judgeships. Please feel free to call me if there are any questions or if I can provide you with more information. Thank you for your continued support and assistance to the County of Monterey.

Sincerely,

/s/ MICHAEL D. JOHNSON
MICHAEL D. JOHNSON
Assistant County
Administrative Officer

MDJ:MEM

cc: Members of the Board of Supervisors
Mr. Rubin Lopez, Consultant, –
Assembly Judiciary Committee

Enclosures